

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

**MARITIME COMMUNICATIONS/LAND
MOBILE, LLC**)

EB Docket No. 11-71
File No. EB-09-IH-1751
FRN: 001358779

Participant in Auction No. 61 and Licensee of Various
Authorizations in the Wireless Radio Services)

Applicant for Modification of Various Authorizations in
the Wireless Radio Services)

Applicant with **ENCANA OIL AND GAS (USA),
INC.; DUQUESNE LIGHT COMPANY; DCP
MIDSTREAM, LP; JACKSON COUNTY RURAL
MEMBERSHIP ELECTRIC COOPERATIVE;
PUGET SOUND ENERGY, INC.; ENBRIDGE
ENERGY COMPANY, INC.; INTERSTATE
POWER AND LIGHT COMPANY; WISCONSIN
POWER AND LIGHT COMPANY; DIXIE
ELECTRIC MEMBERSHIP CORPORATION,
INC.; ATLAS PIPELINE-MID CONTINENT,
LLC; DENTON COUNTY ELECTRIC
COOPERATIVE, INC., DBA COSERV
ELECTRIC; AND SOUTHERN CALIFORNIA
REGIONAL RAIL AUTHORITY**)

) Application File Nos. 0004030479,
0004144435, 0004193028,
0004193328, 0004354053,
0004309872, 0004310060,
0004314903, 0004315013,
0004430505, 0004417199,
0004419431, 0004422320,
0004422329, 0004507921,
0004153701, 0004526264,
0004636537, 0004604962

For Commission Consent to the Assignment of Various
Authorizations in the Wireless Radio Services)

FILED/ACCEPTED

JUN - 7 2012

Federal Communications Commission
Office of the Secretary

TO: MARLENE H. DORTCH, SECRETARY
ATTN.: CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

**MOTION FOR LEAVE TO FILE BENCH BRIEF AND
BENCH BRIEF OF DUQUESNE LIGHT COMPANY**

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Duquesne Light Company, by its undersigned counsel, hereby moves the Presiding Judge for leave¹ to file this Bench Brief in response to the May 23, 2012 Order (“Order”) setting forth the parameters for the burden of proof in this matter.

ARGUMENT

I. Federal Communications Law Requires Particular Burdens of Proof in this Matter

Two statutes, 47 U.S.C. §§ 309(e) and 312(d), set forth the applicable burdens of proof in this matter. Where an application to the Commission is challenged, section 309 places the burden on the applicant, except where a petition to deny the application is at issue, in which case the Commission may determine the party bearing the burden. Where the Commission seeks to impose sanctions or forfeiture on a licensee, section 312 places the burden on the Commission.

In the Hearing Designation Order,² the Commission identified ten issues for hearing and identified the burden of proof that applies to each:

70. IT IS FURTHER ORDERED that pursuant to § 312(d) of the Act, 47 U.S.C. §312(d) and §1.91(d) of the Commission’s rules, 47 C.F.R. § 1.91(d), the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Enforcement Bureau as to the issues at ¶ 62 (a) – (i), above, and that, pursuant to section 309(e) of the Act, 47 U.S.C. section 309(e), and section 1.254 of the Commission’s rules, 47 C.F.R. § 1.254, the burden of proceeding with the introduction of evidence and the burden of proof shall be upon Maritime Communications/Land Mobile, LLC, as to the issue of ¶62 (j), above.

The issues set forth in ¶ 62 (a) – (g) of the HDO include all of the alleged violations by Maritime Communications/Land Mobile, LLC (“Maritime”) of the Commission’s rules, including: (a) failure to disclose the real party in interest in Auction 61; (b) failure to disclose all attribution information in the auction; (c) false certification as a designated entity in the auction; (d) failure

¹ The Order directed only the Enforcement Bureau and Maritime Communications/Land Mobile, LLC to file “Bench Briefs.” Duquesne Light Company, as a party to this case, hereby seeks leave to file this Bench Brief.

² *In re Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, FCC 11-64 (*rel* Apr 19, 2011).

to amend auction application; (e) misrepresentation in the auction; (f) making of incorrect written statements; and (g) failure to construct or operate stations. Subparagraphs (h) and (i), meanwhile, are directed to a determination of the appropriate sanction of Maritime if it is found to have violated any of the allegations above. As to each of these items, section 312 of the Act, as reflected in the Commission's HDO, places the burden of proof on the Enforcement Bureau.

By contrast, only one item in the HDO, ¶ 62(j), places the burden of proof on Maritime.

It provides:

(j) To determine, in light of the foregoing issues, whether the captioned applications filed by or on behalf of Maritime Communications/Land Mobile, LLC, should be granted.

Id (emphasis added). Thus, only in regards to the defense of its applications does Maritime bear the burden of proof.

II. The Order Improperly Alters the Established Burdens of Proof

In section II of the Order, the Presiding Judge held that “the burden of proof[,] where the relevant information is within the possession or control of a particular party[,] may be assigned to that party in the discretion of the Presiding Judge.” This dictate appears to apply to the entire case (“*In this case*, Maritime is the primary and best source of the relevant evidence...”).

The Order cites two cases in support of its proposition that it is Maritime that carries the entire burden in this case. In *In re Rem Malloy*, 5 FCC Rcd 3988, ¶ 5 (1990) (citing ALJ order, emphasis added), at issue was Special Markets Media's behavior in “prosecuting its AM application.” The ALJ in that case, in view of the section 1.254 of the Commission's rules regarding challenges to applications, found that the burden of proof was placed on Special Markets Media. *Id*.

Similarly, in *In re Telestar, Inc.*, 2 FCC Rcd 7352, ¶ 4 (1987), at issue were “15 applications filed by Telestar for authority to construct common carrier microwave radio stations....” (emphasis added). Citing to section 309(e) of the Act, the Commission determined in the case that the burden of proof was on Telestar to show that it was “qualified to be a licensee and that the public interest will be served by its application.” *Id* (emphasis added).

This case, unlike those cited in the Order, does not involve only a challenge to an application. Indeed, nine of the ten issues raised in the HDO relate to something other than Maritime’s pending applications. *See* HDO, ¶ 62. The HDO recognized this distinction in paragraph 70, where it established the correct burdens of proof on *both* the Enforcement Bureau (as to issues (a) – (i)) and Maritime (as to issue (j)). Indeed, more recent cases than those cited in the Order have recognized the dual burdens of proof as well. *In re Terry Keith Hammond*, 24 FCC Rcd 8229, ¶¶ 3-4 (2009) for example, the Enforcement Bureau stated as follows:

Specifically, the Hearing Designation Order ordered Mr. Hammond to show cause, pursuant to Sections 312(a) and (c) of the Communications Act of 1934, as amended (the “Act”), why the Station’s license should not be revoked. With regard to these issues, the Hearing Designation Order placed the burden of proceeding with the introduction of evidence and the burden of proof on the Enforcement Bureau.

4. Next, pursuant to Section 309(e) of the Act, the Hearing Designation Order designated Mr. Hammond’s renewal application for the Station for hearing. [] The Hearing Designation Order placed the burden of proceeding with the introduction of evidence and the burden of proof regarding these issues on Mr. Hammond.

Id. (emphasis added).

The HDO, the Act, and *In re Terry Keith Hammond* are controlling authority regarding the burden of proof in this case. The Enforcement Bureau must continue to carry its burden in proving Maritime violated the Commission’s rules as set forth in HDO ¶ 62 (a) – (g), as well as

in establishing that the sanctions posited in sections (h) and (i) would be appropriate under the developed facts in the case.

III. Effectively, the Entire Burden Should be on the Enforcement Bureau

Only the burden of showing “whether the captioned applications...should be granted,” rests upon Maritime. *See* HDO, ¶ 62(j). In reality, however, this issue is merely another possible sanction available to the Enforcement Bureau to seek in this proceeding. Issue (j) is less a factual issue requiring investigation, like items (a) through (g), than it is a potential sanction similar to (h) (disqualification as a licensee) and (i) (revocation of licenses). Indeed, the Commission has held that challenges to license renewal and assignments/transfers, as well as revocation proceedings, “are in the nature of an enforcement action against a licensee....” *In re Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 2 FCC Rcd 947, ¶143.

Thus, the effective burden in this entire matter must be on the party bringing the enforcement action—the Enforcement Bureau. Once the Enforcement Bureau has developed—through all of its various tools of discovery and then at trial—the evidence in this case, only then may issues of sanction become relevant.

IV. Maritime’s Primary Burden is to Respond Appropriately to Discovery

The Order posits that because “Maritime is the primary and best source of the relevant evidence,” the burden of proof in this case should be placed on it. This goes too far. Certainly, Maritime has a burden to produce relevant documents and to respond appropriately to discovery requests.

Yet, no matter how true it may be that Maritime knows information about its “lawful construction and operation of stations,” this fact does not obviate the need to follow the dictates

of sections 309 and 312 of the Act as to the proper burden of proof. *Moreover, the tools of discovery eliminate any alleged superior position of Maritime.* If the Enforcement Bureau wants to know the status of construction of Maritime's stations, for example, it can ask Maritime for that information, not merely through interrogatories, but via requests for admissions. If Maritime fails to provide such information, the Presiding Judge can determine that for purposes of this case, those questions are deemed admitted.

Discovery is an effective and proven method to prepare a case for trial. But even where a party struggles to develop its case, by no means is the solution to alter the statutory burdens of proof in the case, however expeditious it may seem.

CONCLUSION

For the foregoing reasons, Duquesne Light Company requests that the Presiding Judge reaffirm the burdens of proof as set forth in the HDO.

Respectfully submitted,



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Dated: June 7, 2012

CERTIFICATE OF SERVICE

I, Charles A. Zdebski, certify that on this 7th day of June, 2012, I caused a true and correct copy of the foregoing Motion For Leave to File Bench Brief and Bench Brief of Duquesne Light Company to be served via first-class mail, postage prepaid, upon:

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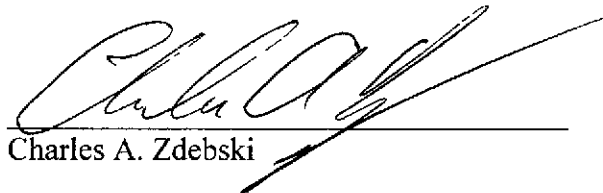
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